FILE COPY

FILED
FEB
CHARLES E.

SUPREME COURT
OF THE
UNITED STATES.

October Term 1931.
No. 528.

Peirce Coombes, *Petitioner,*

vs.

Milton E. Getz, *Respondent.*

SUPPLEMENT TO BRIEF FILED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOSEPH L. LEWINSON,
W. H. DOUGLASS,
Rowan Building, Los Angeles.

NAT SCHMULOWITZ,
J. C. McKINSTRY,
JOSEPH HABER, JR.,
CHARLES L. FIREBAUGH,
OLIVER BROWN WYMAN,
BRONTE M. AIKINS,
ERNEST LOUIS BRUNE,
GEORGE B. HARRIS,
Bank of America Building, San Francisco.

Attorneys for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX

Page

Statement 3

Summary of Argument 7

Brief of Argument 9

A.

Cases Involving Stockholders' Liability Demonstrate That Retroactive Effect Given to Repeal of Section 3 of Article XII of California Constitution Impairs Obligation of Contract 9

B.

Reserved Power to Alter or Repeal Corporation Laws Does Not Empower State to Destroy or Impair the Contract Rights of Corporate Creditors 14

1. Apart from corporation law rights of a contractual or quasi contractual nature that have arisen out of transactions authorized by statute may not be destroyed or impaired by subsequent repealing statutes 15

2. The Legislature may restrict or revoke, at its pleasure, any of the powers of a municipal corporation, but in doing so it may not impair the obligation of contracts 17

3. The Legislature may not impose unconstitutional conditions upon corporations or persons dealing with them 18

4. Section 16 of Article I and Section 1 of Article XII of the California Constitution are in pari materia 20

5. If the reserved power clause is an implied term of corporate contracts, it is also an implied term that the clause be read prospectively 21

C.

Respondent's Cases Are Not in Point 22

Conclusion 28

TABLE OF CASES AND AUTHORITIES CITED

Page

Bank of Old Dominion v. McVeigh, 20 Gratt. (Va.) 457 11

Bank v. Arnold, 20 Misc. 107, 45 App. Div. 314, 169 N. Y. 11, 12

Bank of National Banks v. Atkins, 72 Vt. 43 ..... 12, 27

Bank v. Commissioners, 205 U. S. 503, 528 18

Bank v. [illegible] 19

Bank v. Mayor, 104 Fed. 674 19

Bank v. [illegible] 22

Banking Bldg. v. Commissioners, 174 U. S. 636 22

PAGE

Civil Code, Sec. 404 20
Constitution of Nebraska of 1875, Art. XI B, Sec. 1 20
Constitution of Nebraska, Art. I, Sec. 16 21
Dean v. Shingle, 198 Cal. 652 13
G. S. 86; Secs. 22, 23, 1851, No. 45 12
Grayson v. Harris, 267 U. S. 352, 358 23
Greenwood v. Freight Railroad Co., 15 Otto 13 22
Greenwood v. Union Freight Railroad Company, 15 Otto 13 15
Hammond Packing Co. v. Arkansas, 212 U. S. 322 22
Harrison v. Remington Paper Co., 140 Fed. 385 10
Hathorn v. Calef, 2 Wallace 10 ..... 9, 10, 12
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702 13
Huntington v. Attrill, 146 U. S. 657 12
Huntington v. Attrill, 1893 App. Cas. 150 12
Larson v. South Dakota, 278 U. S. 429 23
Liggett v. Baldridge, 278 U. S. 104 18
Looker v. Maynard, 179 U. S. 76 22
Major v. Walker, 23 Cal. App. 465 13
McDonnell v. Alabama Life Ins. Co., 85 Ala. 401 (Alabama Constitution 1868, Art. VIII, Sec. 1) 12
Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262 22
O'Connell v. Walker, 12 Cal. App. 694 13
Ochiltree v. Iowa etc. Co., 21 Wallace 249 10
Ohio Constitution of 1851, Art. VIII, Sec. 2 10
Omaha Water Company v. City of Omaha, 147 Fed. 1 20
Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450 16
Pate v. Bank of Newton, 116 Miss. 666 11
Pittsburg Steel Co. v. Baltimore Equitable Society, 226 U. S. 455 10
Polk v. Mutual Reserve Life Ins. Fund, 207 U. S. 310 22
Revised Statutes of 1841, 17 L. Ed. 778 9
R. L. 1880, Title 24, Ch. 152, Sec. 3257 12
San Mateo v. Southern Pacific Ry. Co., 13 Fed. 722 19
Schramm v. Done, 135 Ore. 16 21
Sinking Fund Cases, 9 Otto 700 14
Smathers v. Bank, 135 N. C. 411 ..... 11, 21
St. Louis Ry. Supplies Co. v. Harbine, 2 Mo. App. 134 (1876); (Missouri Constitution 1865, Sec. 4, Art. VIII) 11
State Constitution, Art. XII, Sec. 1 5
State Constitution of 1879, Art. I, Sec. 16 5
State Constitution of 1879, Art. XII, Sec. 3 6
Terral v. Burke Construction Company, 257 U. S. 529 18
United States Constitution, Art. I, Sec. 10 5
Van Hoffman v. Quincy, 4 Wall. 535 17
Wasser v. Congregation Agudath Sholom, 262 Mass. 235 16
Western Union Teleg. Co. v. Hopkins, 160 Cal. 106 21
Winchester v. Howard, 136 Cal. 432 13
Wolff v. New Orleans, 13 Otto 395 17
Woodbine Sav. Bank v. Shriver, 226 N. W. 374 11

SUPREME COURT
OF THE
UNITED STATES.

October Term 1931.

No. 528.

Peirce Coombes,
Petitioner,

vs.

Milton E. Getz,
Respondent.

SUPPLEMENT TO BRIEF FILED IN SUPPORT OF PETITION.

STATEMENT.

This brief is filed to supplement the brief filed in support of the petition for a writ of certiorari, on the point that the retroactive effect given to the repeal of Section 3 of Article XII of the Constitution of California by the decision of the State Supreme Court impairs the obligation of contract, despite the provisions of Section 1 of Article XII of the State Constitution, reserving the power to alter or repeal laws concerning corporations.

In 1925 petitioner brought suit, based on Section 3 of Article XII of the State Constitution of 1879, on behalf of himself and other creditors, to recover from the directors

of Getz. Bros. & Company the loss suffered by that corporation by reason of the embezzlement of sums in excess of $550,000.00 by an officer of the corporation. [R. 19.] The court sustained a demurrer to the complaint, on the ground that it was barred by limitations, and judgment of dismissal was entered on the demurrer on April 14, 1930. [R. 32.] On April 21, 1930, petitioner served notice of appeal to the State Supreme Court. [R. 33.]

On November 4, 1930, Section 3 of Article XII of the State Constitution was repealed without a saving clause [R. 37]; and on July 23, 1931, the State Supreme Court, pursuant to motion theretofore made by respondent, dismissed petitioner's appeal (without considering the case on its merits) holding that the repeal of Section 3 of Article XII of the State Constitution had destroyed petitioner's cause of action. [R. 37.] Petitioner resisted respondent's motion to dismiss the appeal, setting up Section 10 of Article I of the United States Constitution [R. 51], and petitioned for a rehearing, again invoking that section [R. 39].

The petition for rehearing was denied by the State Supreme Court, Langdon, *J.*, dissenting [R. 50]; and further opinions were filed. [R. 51-53.]

The opinion dismissing the appeal was put on the ground that to destroy petitioner's cause of action by retroactive repeal would not impair the obligation of contract, because petitioner's right was "created solely by statute" * * * "depended upon the statute alone" and was "still inchoate" [R. 38].

The majority opinion denying a rehearing conceded that under the settled law of the state the liability of directors

under Section 3 of Article XII (being to respond only for the loss suffered by the corporation as a result of the embezzlement of misappropriation of its funds by an officer) was contractual in its nature, and "undoubtedly entered into and became a part of every contract between the creditors and the corporation as a matter of law;" but the court, nevertheless, held that the power reserved in Section 1 of Article XII of the State Constitution to alter or repeal all laws concerning corporations also "was incorporated by law into such contracts" and permitted a retroactive repeal of Section 3 of Article XII [R. 51.]

The dissenting opinion of Langdon, *J.*, was based on two grounds: (1) that the reservation in Section 1 of Article XII applied to legislative acts and not constitutional provisions; and (2) the reserved power did not warrant the destruction of existing contract rights. [R. 52.]

Attention should be called to Section 16 of Article I of the State Constitution of 1879, which like Section 10 of Article I of the United States Constitution, prohibits laws impairing the obligation of contracts.

Section 16 of Article I of the State Constitution of 1879 is as follows:

> "No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed."

Section 1 of Article XII of the State Constitution of 1879, as it stood prior to November 4, 1930, was as follows:

> "Corporations may be formed under general laws, but shall not be created by special act. All laws now

in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

This section was amended on November 4, 1930, to read as follows:

"The Legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this state concerning corporations and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed."

Section 3 of Article XII of the Constitution of 1879, (excluding certain amendments adopted November 26, 1928, not germane here) read as follows:

"Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

SUMMARY OF ARGUMENT.

A.

In cases involving stockholders' liability for corporate debts, imposed by constitutional or statutory provisions, it uniformly has been held by this court, lower federal courts and state courts that subsequent laws cannot constitutionally destroy or alter a liability already incurred, despite provisions reserving the power to amend, alter or repeal corporation laws or charters; and the cases so holding are controlling here.

B.

The reserved power to amend, alter or repeal does not give the state power to despoil the corporation of its property, much less does it empower the state to destroy or impair the contract rights of corporate creditors.

(1) Apart from laws relating to corporations, the Legislature may repeal statutes at will, but rights that have arisen upon contracts, or transactions in the nature of contracts, authorized by statute, may not be destroyed or impaired by subsequent repealing statutes.

(2) The Legislature may restrict or revoke, at its pleasure, any of the powers of a municipal corporation, but it may not constitutionally restrict the taxing power of a municipal corporation so that it will be unable to pay its existing bonds.

(3) While the Legislature may impose conditions upon corporations or persons dealing with corporations, it may not impose arbitrary or unconstitutional conditions.

(4) Section 16 of Article I and Section 1 of Article XII of the State Constitution are in *pari materia;* so, if the reserved power is to be read into corporate contracts, the prohibition against impairing the obligation of contracts must likewise be read into them.

(5) Statutory and constitutional provisions must be construed prospectively, unless a retroactive construction is expressly called for; hence, if Section 1 of Article XII of the State Constitution is to be read into contracts it must be read into them with a prospective construction.

C.

The cases cited by respondent are not in point; because, they deal with the effect of the repeal of corporate charters; or uphold statutes relating to taxation, railroad rates and service, or monopolies; or hold that stockholders' liability may be altered prospectively; or hold that reasonable changes may be made in the internal structure of corporations.

BRIEF OF ARGUMENT.

A.

Cases Involving Stockholders' Liability Demonstrate That Retroactive Effect Given to Repeal of Section 3 of Article XII of California Constitution Impairs Obligation of Contract.

In *Hathorn v. Calef*, 2 Wallace 10 (1865), the suit was against a stockholder in the Kennebec Railroad Company to recover an indebtedness incurred by the corporation. The corporation was organized in 1846. The debt was contracted in 1855. The charter of the corporation made stockholders individually liable for the debts of the corporation "to the amount of their stock". In 1856 this individual liability clause of the charter was repealed. The Supreme Court of Maine held that the repealing statute precluded plaintiff from recovering. On writ of error, this court reversed the Maine court, holding that the liability was contractual and not purely statutory; also, that the repealing statute as construed by the Maine court violated the contract clause of the Federal Constitution.

In this court counsel for defendant in error urged, among other things, that the decision of the Maine court was right, in view of the reserved power to alter, amend or repeal contained in the Revised Statutes of 1841. In that behalf counsel said:

> "That Charter was accepted subject to the Revised Statutes of 1841, which fixed the liabilities of stockholders, and also authorized the Legislature of Maine to alter, amend or repeal this charter at its pleasure; and the Act of April 9th, 1856, was rightfully enacted by virtue of this authority." (17 L. Ed. 778.)

In its opinion this court did not notice the point thus made by counsel.

The rule announced in *Hathorn v. Calef, supra,* has been approved by this court in *Ochiltree v. Iowa etc. Co.,* 21 Wallace 249 (1874), and *Pittsburg Steel Co. v. Baltimore Equitable Society,* 226 U. S. 455 (1912).

The *Ochiltree case* went up from Missouri, and at the time in question Section 4 of Article VIII of the Missouri Constitution of 1865 contained a reserved power clause. The *Pittsburg Steel Co. case* went up from Maryland, and at the time in question Section 48 of Article III of the Maryland Constitution of 1908 contained a reserved power clause. In neither case was the reserved power clause called to the attention of the court by counsel, nor was it noticed by the court.

In *Harrison v. Remington Paper Co.,* 140 Fed. 385 (1905), the Circuit Court of Appeals for the Eighth Circuit held that stockholders' liability arising under the Constitution of Kansas, was contractual, and stockholders' liability on a debt that had already been contracted could not be impaired by a subsequent constitutional amendment. The court did not notice Section 1 of Article XII of the Kansas Constitution of 1850 which contained a reserved power clause. In *Blackburn v. Irvine,* 205 Fed. 217 (1913), the Circuit Court of Appeals for the Third Circuit held similarly in a case which arose in Ohio, without noticing the reserved power clause contained in Section 2 of Article VIII of the Ohio Constitution of 1851.

From the above cases it would appear that the federal courts have not deemed the point made in support of the decision of the court below as sufficiently substantial to

merit discussion. The point, however, has been discussed by a number of state courts and determined to be without merit.

In the following cases it has been expressly held, after full consideration of the point, that a law changing the liability of stockholders, upon an indebtedness already accrued, impairs the obligation of contract under Section 10 of Article I of the United States Constitution, even though at the time the debt was incurred there existed a reserved power to alter, amend or repeal the corporate charter or the laws under which the corporation was incorporated.

Woodbine Sav. Bank v. Shriver, 226 N. W. 374 (Ia. 1929);

Pate v. Bank of Newton, 116 Miss. 666 (1917);

Bank of Old Dominion v. McVeigh, 20 Grat. (Va.) 457 (1871).

In *Smathers v. Bank*, 135 N. C. 411 (1904), and *Barnes v. Arnold*, 23 Misc. 197 (1898) [affirmed 45 App. Div. 314 (1899), and 169 N. Y. 611 (1911)], the reserved power was considered and the amendatory statutes given prospective construction in order to render them constitutional.

There are also state decisions in which it has been held, without noticing the reserved power clauses in force, that the liability of stockholders might not be changed as to existing obligations.

St. Louis Ry. Supplies Co. v. Harbine, 2 Mo. App. 134 (1876), (Missouri Constitution 1865, Sec. 4, Art. VIII);

Morton National Bank v. Athins, 72 Vt. 33 (1899), Vermont Statutes:

1. G. S. 86; Sess. 22, 23, 1851, No. 45;
2. R. L. 1880, Title 24, Ch. 152, Sec. 3257.

McDonnell v. Alabama Life Ins. Co., 85 Ala. 401 (1888), (Alabama Constitution 1868, Art. VIII, Sec. 1).

It is submitted that the cases we have reviewed, being founded on the contractual character of the stockholders' liability, are controlling here.

In *Huntington v. Attrill*, 146 U. S. 657 (1892), this court held that a New York judgment based on the New York statute making the officers of a corporation, who signed and recorded a false certificate, liable for its debts, was enforcible in Maryland because it was not a penal statute in the international sense of that term. In the course of the opinion, the court suggested the applicability of the rule laid down in *Hathorn v. Calef*, *supra*, to cases of directors' liability arising out of statute but of a contractual character. (146 U. S. at 679.)

In a case arising under the same statute as was involved in *Huntington v. Attrill*, *supra*, the Judicial Committee of the Privy Council held that a New York judgment was enforcible in Ontario. (*Huntington v. Attrill*, 1893 App. Cas. 150.) After referring to various uses of the word "penal", the English Court made the following observations:

"In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or

> may become creditors of the corporation. [illegible] far as they concern creditors [illegible] in their nature protective and remedial [illegible] the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors." (1893 App. Cas. p. 159.)

The liability of directors under Section 3 of Article XII of the California Constitution uniformly has been held to be contractual and not penal.

Dean v. Shingle, 198 Cal. 652 (1926);
Major v. Walker, 23 Cal. App. 465 (1913);
O'Connell v. Walker, 12 Cal. App. 694 (1910);
Hercules Oil Co. v. Hocknell, 5 Cal. App. 702 (1907);
Brown v. Major, 164 Fed. 673 (C. C. A. 9th Cir., 1908);
Winchester v. Howard, 136 Cal. 432 (1902).

In *Dean v. Shingle, supra*, after holding that the liability imposed by Section 3 of Article XII was to respond for the loss suffered by the corporation and not for the amount of the embezzlement or misappropriation, the court said, relative to the nature of the liability:

> "The liability imposed by the provisions is that of surety * * *. Directors take office knowing the responsibility they assume in so doing. In the eye of the law they do so as freely and voluntarily as they would do if they signed a bond agreeing to be responsible for the conduct of the corporate officers." (198 Cal. 666.)

The character of directors' liability under Section 3 of Article XII of the California Constitution is indistinguish-

able from stockholders' liability for corporate debts imposed by statute, creating an obligation contractual in its nature.

See *Bernheimer v. Converse*, 206 U. S. 516, 529 (1906).

It is submitted, therefore, that the effect given the repeal of Section 3 of Article XII of the State Constitution by the State Supreme Court impaired the obligation of contract under Section 10 of Article I of the United States Constitution.

B.

Reserved Power to Alter or Repeal Corporation Laws Does Not Empower State to Destroy or Impair the Contract Rights of Corporate Creditors.

The decisions of this court on the scope of reserved power clauses show conclusively that under such clauses the state is not entitled to despoil the corporation of its property. Much less, do such clauses, under the decisions of this court, empower the state to destroy or impair the contract rights of corporate creditors.

In *Sinking Fund Cases*, 9 Otto 700 (1878), in speaking of the exercise of a power reserved by Congress in a charter granted to the Union Pacific Railroad, Chief Justice Waite said:

> "* * * Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts law-

> fully made. * * * whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have already been made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. * * *" (pp. 720, 721.)

In *Greenwood v. Union Freight Railroad Company*, 15 Otto 13 (1881), Miller, J., said:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." (p. 19.)

1. Apart From Corporation Law Rights of a Contractual or Quasi Contractual Nature That Have Arisen Out of Transactions Authorized by Statute May Not Be Destroyed or Impaired by Subsequent Repealing Statutes.

It is elementary that the purpose of reserved power clauses was to overcome the effect of the *Dartmouth College case*, and to give the legislature the same freedom in changing corporation laws as it has in dealing with laws on other subjects. Apart from the subject of corporations, the legislature may, of course, repeal statutes at will. It is settled law, however, that rights which have arisen

upon contracts, or transactions in the nature of contracts, authorized by statute, may not be destroyed or impaired by subsequent repealing statutes.

The leading case on this subject is *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450 (1864). In that case it was held that the repeal of a California statute entitling a pilot to one-half pilotage fees when his services were declined did not operate retroactively. The following is from the opinion:

> "When a right has arisen upon a contract or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute." (pp. 457-458.)

In *Wasser v. Congregation Agudath Sholom*, 262 Mass. 235 (1928), it was held that a statute relating to the duty of insurance carriers under insurance policies did not apply to policies issued before its enactment nor to accidents theretofore occurring. The following is from the opinion:

> "It cannot rightly be held that St. 1914, c. 464, was intended to apply to policies of insurance theretofore issued and to accidents theretofore occurring. So far as it gave a right of action to the person injured, it was something more than a modification of remedy. It would affect substantial contractual rights of the insurer by abolishing the condition precedent to recovery if held applicable to such a case as the present. Ordinarily statutes are held to be prospective and not retroactive in operation. If the statute were framed to be applicable in words to a case like the present, it would be unconstitutional as impairing the obligation of contracts." (pp. 236-237.)

2. The Legislature May Restrict or Revoke, at Its Pleasure, Any of the Powers of a Municipal Corporation, But in Doing So It May Not Impair the Obligation of Contracts.

In *Van Hoffman v. Quincy*, 4 Wall. 535 (1866), Van Hoffman purchased bonds of the City of Quincy issued by virtue of legislative authority. Later acts of the legislature reduced the taxing power of the city to such an extent that the moneys thereby collected would barely meet current municipal expenses, with the result that the city defaulted on its obligations. This court held the later acts of the legislature above referred invalid as impairing the obligation of contract under the contract clause of the United States Constitution.

Wolff v. New Orleans, 13 Otto 358 (1880), was a similar case. The following is from the opinion of the court:

> "It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constituion of the United States, and, among other things, shall not operate directly upon the contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land.". (p. 365.)

3. The Legislature May Not Impose Unconstitutional Conditions Upon Corporations or Persons Dealing With Them.

Giving retroactive effect to the repeal of Section 3 of Article XII of the California Constitution cannot be justified on the theory that the legislature may impose conditions upon corporations, and that persons dealing with corporations do so with notice of such conditions; because, the legislature may not consistently with constitutional limitations impose arbitrary or unconstitutional conditions.

In *Liggett v. Baldridge*, 278 U. S. 104 (1928), this court held unconstitutional a Pennsylvania statute requiring all stockholders in a corporation operating a pharmacy to be registered pharmacists. Sutherlin, J., speaking for the court, said:

> "That appellant's business is a property right (citing cases) and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a 'person' within meaning of the due process and equal protection clauses of the 14th Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the Federal Constitution, is equally well settled. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U. S. 544, 550, 43 Sup. Ct. Rep. 636; Power Mfg. Co. v. Saunders, 274 U. S. 490, 493, 496, 497, 47 Sup. Ct. Rep. 678; Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 594, *et seq.*, 46 Sup. Ct. Rep. 605." (p. 111.)

In *Terral v. Burke Construction Company*, 257 U. S. 529 (1921), it was held that a state might not constitutionally impose a condition on foreign corporations that they refrain from bringing suits in, or removing suits to, the federal courts. After a full citation of authorities, Taft, C. J., said:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." (pp. 532-533.)

The principle announced in the above cases is, it is submitted, equally applicable to domestic corporations.

In *San Mateo v. Southern Pacific Ry. Co.*, 13 Fed. 722 (Cir. Ct. Calif. 1882), a leading case on the subject of reserved power causes, it was held that under the reserved power clause in the California Constitution of 1849, the provisions of the Constitution of 1879 providing for the taxation of railroad property on the basis of value without deduction of outstanding mortgages while other property was to be taxed on the basis of value with such deduction, was unconstitutional. The following is from the opinion of Field, J.:

"Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain

capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change those at will. But whatever property the corporations acquired in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances." (pp. 754-755.)

4. Section 16 of Article I, and Section 1 of Article XII of the California Constitution Are In Pari Materia.

The position taken in the majority opinion of the State Supreme Court that the reservation of power contained in Section 1 of Article XII of the State Constitution justified retroactive repeal is, we, submit, untenable because that section is *in pari materia* with Section 16 of Article I of the State Constitution prohibiting the impairment of the obligation of contract.

This position was taken as a matter of practical construction by the Legislature in passing Section 404 of the California Civil Code which, after authorizing the amendment or repeal of corporation laws, declared: "But such amendment or repeal does not impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred." (Civ. Code, Sec. 404 (1929).)

In *Omaha Water Company v. City of Omaha*, 147 Fed. 1 (C. C. A., 8th Cir., 1906), it was held that the power to alter or repeal general laws under which corporations had been organized, reserved by Section 1, Article XI B of the Constitution of Nebraska of 1875, was limited by

Section 16 of Article I of the same Constitution, which forbade the passage of any law impairing the obligation of contracts, and the section first referred to did not reserve to the legislature the power to destroy or impair contracts of third parties with such corporations. The following is from the opinion:

> "Nor does the section of the Constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity or the effect of this contract. That section is *in pari materia* with section 16, article I, of the same Constitution, which prohibits the Legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the Legislature may make an alteration or repeal of any general law involving the charters of corporations which does not impair the obligation of any contract and that it may make no repeal or alteration of those laws which has that effect." (p. 7.)

See, also:

Western Union Teleg. Co. v. Hopkins, 160 Cal. 106.

5. If the Reserved Power Clause Is an Implied Term of Corporate Contracts, It Is Also an Implied Term That the Clause Be Read Prospectively.

It is elementary that a statute must be construed prospectively and not retroactively unless a retroactive construction is expressly called for. This rule of construction, repeatedly, has been held applicable to statutes changing the liability of stockholders.

Smathers v. Bank, supra;
Barnes v. Arnold, supra;
Barton National Bank v. Atkins, supra;
Schramm v. Done, 135 Ore. 16 (1930).

C.

Respondent's Cases Are Not in Point.

In *Sherman v. Smith*, 1 Black 587 (1862), a constitutional provision changing stockholders' liability was upheld. By its terms the constitutional provision called for prospective and not retroactive construction. See p. 167.

Looker v. Maynard, 179 U. S. 76 (1900), upheld a statute providing for cumulative voting, on the ground that it was a reasonable regulation of internal affairs.

Greenwood v. Freight Railroad Co., 15 Otto 13 (1881), involved an act of the Massachusetts legislature repealing the charter of a railway company and authorizing a new corporation to take so much of the property or franchises of the old corporation as were necessary to the public use, upon making due compensation.

Polk v. Mutual Reserve Life Ins. Fund, 207 U. S. 310 (1907), involved a statutory reorganization of a corporation, that was not unfair. See. pp. 324, 328.

Citizens Savings Bank v. Owensboro, 173 U. S. 636 (1898), *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1908), and *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262 (1909), deal with statutes relating to taxation of corporations, railroad rates and service, and anti-trust regulations.

Calder v. Michigan, 218 U. S. 591 (1910), only held that bondholders had no standing to resist *quo warranto* proceedings to oust a water works company from its franchise after its charter had been repealed by the legislature pursuant to a reserved power clause.

CONCLUSION.

In *Larson v. South Dakota*, 278 U. S. 429 (1929), it was said by Taft, C. J., after citing numerous cases: "Petitioner relies on the contract clause of the Federal Constitution, and it is not prevented from invoking from this court an independent consideration of what the contract means, and whether, by a proper construction, the building of a bridge impairs its obligation." (p. 433.)

It is respectfully submitted that upon such an independent consideration the judgment of the Supreme Court of California dismissing petitioner's appeal should be reversed; and (inasmuch as this court will not pass upon the question of limitations, not decided by the court below, *Grayson v. Harris*, 267 U. S. 352, 358), it is further submitted that the cause should be remanded for hearing on the merits and petitioner should be awarded his costs.

Respectfully submitted,

JOSEPH L. LEWINSON,
W. H. DOUGLASS,
NAT SCHMULOWITZ,
J. C. MCKINSTRY,
JOSEPH HABER, JR.,
CHARLES L. FIREBAUGH,
OLIVER BROWN WYMAN,
BRONTE M. AIKINS,
ERNEST LOUIS BRUNE,
GEORGE B. HARRIS,
Attorneys for Petitioner.